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IS A "PHILOSOPHICALLY BALANCED" SUPREME COURT POSSIBLE?

SENATOR J. JAMES EXON*

Through my responsibilities in the United States Senate as part of the confirmation process for federal judges, and from my experience in appointing many judges as Governor of Nebraska, I have always felt a heavy responsibility to reach the best possible judgment on such matters. The individuals recommended for judicial positions must satisfy qualifications tests in a number of areas, not just one. Few have met all of the criteria of the extensive panorama of "tests" that I have applied to each potential jurist. Perfection in all our actions and decisions as we pass through life is a worthy but unattainable goal. The same is true of the federal bench.

Judges face especially difficult and vital decisions which inevitably affect a wide range of people in all areas of everyday life. Because the ultimate responsibility of judges is to dispense justice, we dare not submit them to anything but the greatest scrutiny.

If there is a single ideal requirement for the judiciary, it is balance. The political system that we have employed in the selection process does not well lend itself to that worthy goal. It could be argued that previous Supreme Courts have obviously had a bent far different from the present one. Two wrongs, however, do not make a right and I would prefer a more philosophically balanced court.

I am convinced that the present administration and the one preceding it have gone more doctrinaire and strident in their nomi-

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nees at every level of the federal bench than any others. Generally, the litmus test on strongly held conservative viewpoints has been applied. So much for "balance." Indeed the current Justice Department has dramatically stepped up its political involvement in the process. I am very concerned and may be addressing the process of selecting federal judges further at a subsequent time.

But the challenge today is to face the situation with reality and make the best decision possible.

I. THE NOMINATION OF JUDGE CLARENCE THOMAS

A. *Initial Announcement of Support—October 4, 1991*

With regard to the current nominee, there were early surprises that reflect my concern with the process.

The President, supposedly devoid of all political or quota considerations, proudly announced his nominee, Clarence Thomas, as the "best man for the job on the merits." Since then, via the examination process, the truth has come to light. I would expect there are few, if any, who believe what the President told the people of the United States as I have just quoted him. Even as a supporter of Judge Thomas, I found this statement to be an unfortunate oversell of his credentials on the part of the President.

Although the Judiciary Committee did not agree that "the best person" had been selected, at least half of the Committee felt that Clarence Thomas was "qualified," as did the American Bar Association. I was surprised that he was not approved by the Committee, but my review of its findings has shown me its deliberation and carefully studied conclusions were difficult if not tortured. I salute all of the Committee members in their studious efforts to reach their individual and collective conclusions.

My personal evaluation of Judge Thomas is that he is qualified. During my personal meeting with him, I was impressed with his academic credentials, intelligence, determination and family values. Indeed, he is an American success story by any measurement. Furthermore, he has demonstrated judicial temperament, which from my experience, has to be the key for making a determination. Although Judge Thomas does not have extensive courtroom or trial experience as a lawyer, and little, if any, in the federal

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courts, there have been others with similarly limited private practice who have subsequently served on the courts with distinction.

It is my view that Judge Thomas’s background and very human personal experiences would make him intellectually incapable of being other than a thoughtful and independent-minded jurist whose positions on issues could not be predicted in advance. He may well turn out to be a keen disappointment to some of his more vocal supporters, and a happy surprise to some of his more vocal opponents. In my view, he is qualified and I will support his nomination with my vote at this time.

B. Final Statement in Support of Judge Thomas—October 15, 1991

On Friday, October 4th, before I ever heard of Professor Anita Hill, I announced my initial support of the nominee, Clarence Thomas. At that time the Judiciary Committee had completed its hearing and forwarded its written findings to the Senate without recommendation. My support was based upon my assessment of the facts at hand and my personal conversations with the nominee.

Three days later on Monday, October 7th, after the revelations of that weekend, I was back on the floor suggesting a one-week delay in the scheduled vote, to give the Committee additional time to delve into the serious charges that had been leveled against Judge Thomas by Professor Hill. That delay came to pass.

It was a wise decision from the standpoint of fairness to all, including the nominee, his accuser and the obligation of the Senate to more thoroughly investigate. Judge Thomas, along with the others, eventually came to the same conclusion.

As a result of the recent developments, there has been a legitimate cry nationwide for a revelation and determination of the “facts” and the “truth.” That is a logical and reasonable request, but obviously over-simplified. Some have even gone so far to maintain that Thomas should be confirmed, because otherwise it would set a precedent that might prevent any qualified person from seeking high appointive positions in government. Others have asserted that if Thomas is appointed it would be the equivalent of condoning sexual harassment of women.

After carefully listening to both Thomas and Hill, this one

member of the eventual "jury" of one hundred feels that both appear believable, but one seemingly is lying under oath, the criminal offense of perjury. Unfortunately, after the hearing it is difficult, if not impossible, for me to determine what the "facts" or "truths" are. I suspect that this might be the opinion of many who listened to the recently concluded hearings.

Those to whom I customarily turn for advice on such important matters are deeply divided. My constituents, my family, my closest friends and even my staff are unbelievably split. Emotions are running amuck and from every direction, more so than I recall previously from over twenty years of public service. The boat of discussion and decision making has been so violently rocked and the rudder out of the water so often, it is difficult to steer any sound course to a determination.

Unfortunately, in my view, the hearings of the past few days have not produced any overall conclusive facts or definitive truths on the charges by Hill or the firm denials by Thomas. Indeed, regardless of the eventual outcome of this matter, the controversy has clearly been beneficial in its significant contribution to necessary changes and understanding in the work place.

The key and central issue here, though, is not what is in the best interest of either of the two antagonists. We cannot ignore what is fair or not fair to the individuals nor the harm to either that our eventual decision will bring. But even more important than that is how our decision will affect the future. To assail the process or attempt to punish individuals or institutions which one might conclude in retrospect should have acted differently, evades and tends to place out of focus the real object of the process, as painful as it is for all of us.

We must concentrate now on the all-encompassing issue as to whether or not Clarence Thomas should be confirmed for a lifetime appointment to the highest Court in the land. On October 4th I supported the nomination on the floor on the basis of my knowledge at that time. Among other things I stated that I felt Judge Thomas met the test of "judicial temperament."

There has developed in my mind no clear-cut choice, more a mixture of concerns and doubts. How best do we conclude this whole unhappy chapter?

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Notwithstanding my reservations as to the nominee, I intend to vote for confirmation, but without enthusiasm. It is my hope that if confirmed, Judge Thomas will be a better Justice because of this ordeal. It is my belief that he will not turn out to be the doctrinaire ideologue on the Court he is projected to be.

We badly need some overall balance there. If confirmed, Judge Thomas has the roots and earlier experiences to provide that. Time will tell.

